

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SARAH A. D'ANNIBALE

Plaintiff,

CV-06-1202-ST

v.

FINDINGS AND
RECOMMENDATION

MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration, and the SOCIAL
SECURITY ADMINISTRATION,

Defendants.

STEWART, Magistrate Judge:

In her First Amended Complaint, plaintiff alleges three counts against defendants.

Count 1 is a traditional challenge pursuant to the Social Security Act (“Act”), 42 USC §§ 405(g) and 1383(c)(3), to obtain judicial review of a final decision of the Commissioner denying her application for Disability Insurance Benefits (“DIB”) under Title II of the Act, as well as for Supplemental Security Income (“SSI”) disability benefits under Title XVI of the Act. Count 2 alleges that defendants “failed, neglected and refused” to respond favorably to plaintiff’s request

pursuant to the Freedom of Information Act (“FOIA”), 5 USC § 552 *et seq.*, for “all letters, memos, or other writings, however described, including those stored in computer memory, discussing the number of jobs issue that arises at step 5 of sequential evaluation.” First Amended Complaint, ¶¶ 7-8. Count 3 alleges that defendants violated plaintiff’s constitutional rights “by pretending to or actually relying on Vocational Expert testimony about numbers of jobs that defendants know or should know to be unreliable, in violation of plaintiff’s Fifth Amendment right to substantive due process and/or plaintiff’s Ninth Amendment right to a government that is honest in fact and reasonably competent at what it undertakes to do.” *Id* at ¶ 10(a).

Plaintiff’s counsel filed seven other separate lawsuits on behalf of individuals against defendants, each alleging Counts 2 and 3 identical to Counts 2 and 3 alleged in this lawsuit.

Pursuant to FRCP 12(b)(1) and (6), defendants filed a Motion to Dismiss Counts 2 and 3 of Plaintiff’s First Amended Complaint (docket # 14) for failure to state a claim upon which relief can be granted and lack of jurisdiction over the subject matter. Defendants filed an identical motion in the other seven lawsuits filed by plaintiff’s counsel. On April 3, 2007, plaintiff moved to consolidate all eight lawsuits (docket # 27). On April 18, 2007, this court granted plaintiff’s Motion to Consolidate “to the extent that the Honorable Judge Ann Aiken will decide Defendant’s Motion to Dismiss, which is also filed in her case, CV 06-1331-AA” (docket # 31). On May 16, 2007, Judge Aiken issued her Opinion and Order granting defendants’ motion to dismiss.

This court concurs with Judge Aiken’s ruling. For the same reasons given by Judge Aiken, defendants’ Motion to Dismiss Counts 2 and 3 in this case should be granted.

2 - FINDINGS AND RECOMMENDATION

RECOMMENDATION

Defendants' Motion to Dismiss Counts 2 and 3 of Plaintiff's First Amended Complaint (docket # 14) should be GRANTED.

SCHEDULING ORDER

Objections to the Findings and Recommendation, if any, are due **June 4, 2007**. If no objections are filed, then the Findings and Recommendation will be referred to a district judge and go under advisement on that date.

If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district judge and go under advisement.

DATED this 17th day of May, 2007.

/s/ Janice M. Stewart _____
Janice M. Stewart
United States Magistrate Judge